RUSLI LUWI

v.

RM TOP HOLDINGS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-53-2002]
26 FEBRUARY 2003

ADMINISTRATIVE LAW: *Remedies - Certiorari - To quash award of Industrial Court - Whether there were erroneous findings - Whether contract of service existed between first respondent and employee - Whether dismissal without just cause and excuse - Veil of incorporation - Whether should be lifted - Whether award perverse or unreasonable*

The applicant was employed as the second respondent's operations executive in a project known as the External Window Cleaning Project at KLCC ('the project'). The applicant entered into an agreement to serve the second respondent and was sent to Houston for a two-week building maintenance course. Upon his return, however, the project had been taken over by the first respondent and the applicant's services had been transferred to it. Thereafter the applicant reported for duty at the first respondent's site office. Throughout his tenure working for the first respondent, a letter of appointment was never issued. Subsequently the applicant was terminated without any assigned reason. The applicant then made representations against the first respondent and sought for reinstatement under s. 20 of the Industrial Relations Act 1967 ('the Act') in the Industrial Court ('third respondent').The second respondent was joined as a party to the proceedings. The Industrial Court handed down an award against the applicant and dismissed his claim. Dissatisfied with the impugned award, the applicant made an application for *certiorari* to the High Court to quash it.

The applicant contended that the Industrial Court had erred in its findings when it held that: (1) the second respondent was the applicant's true employer; (2) the applicant had failed to prove that he had been dismissed and that the applicant had walked out of his job on his own accord; (3) there was no good reason to lift the veil of incorporation.

Held (allowing the application):

[1] There was an agreement between the second respondent, the applicant and the first respondent to transfer the applicant's services to the first respondent. The effect of such an agreement terminated the applicant's contract with the second respondent. The second respondent had explicitly repudiated the applicant's contract of employment and the applicant affirmed the repudiation by the second respondent when he went on the transfer to the first respondent and reported to work at the latter's site office. The employer-employee relationship between them had been terminated by mutual consent. (p 367 a-e)

[2] The Industrial Court not only arrived at a perverse decision but a decision which was diametrically opposed to the evidence on record when it held that with the absence of the resignation letter by the applicant or any letter of termination from the second respondent to the applicant, the relationship of employer and employee between the second respondent and the applicant had not been severed. The chairman's findings in this respect not only went against s. 30(5) of the Act but was devoid of any plausible justification that no reasonable person or tribunal could have reached such decision. (p 368 b-d)

[3] The Industrial Court had not considered the significant factor of the first respondent being the ultimate paymaster and that it contributed to the applicant's EPF, which was indicative of the applicant being an employee of the first respondent. As regards the non-issuance of a letter of appointment by the first respondent, the first respondent had in fact committed an act of unfair labour practice. The Industrial Court misdirected itself in law and in fact when it failed to make a finding that the omission and failure on the part of the first respondent to issue any letter of service to the applicant should be construed adversely against the first respondent in the face of unequivocal evidence of an employer and employee relationship that was adduced by the applicant. The Industrial Court had misdirected itself when it failed to decide that there was a contract of service that existed between the applicant and the first respondent. (p 381 b-d)

[4] Once all the preliminary work in respect of the actual cleaning work was completed for the project, the first respondent not only terminated the applicant's services without assigning any reasons, but went on further and alleged that it never employed the applicant in the first place. Being a court of equity and good conscience, the Industrial Court ought to have interfered with the order of dismissal that was made against the applicant as the manner in which it was done was clearly capricious, unjust and unreasonable. (p 392 f-h)

[5] The Industrial Court's finding that the applicant had walked out of his job on his own accord was not only perverse but was never pleaded by either the first respondent or the second respondent. As such, the Industrial Court had departed from the pleadings and made a finding in respect of an issue not before it, thus acting beyond its jurisdiction. (pp 392 h-i & 393 a)

[6] Both the first and second respondent were operating as one business enterprise. The arrangement whereby the second respondent appointed the applicant and subsequently transferred him to work in the first respondent was clearly a mere management practice between the first respondent and the second respondent. When two companies, one of which is a subsidiary of the other, are operating as one business enterprise, the court should lift the veil of incorporation. The Industrial Court had erred in law when it failed to lift the veil of incorporation of the second respondent and hold both the first respondent and second respondent liable for the applicant's dismissal from service. (pp 394 d-f & 397 d)

[Ordered accordingly.]

Case(s) referred to:

Bata (M) Kelang v. Ch'ng Soon Poh [1984] ILR 227 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Cygal Bhd v. Issam Abdul Rahman [1998] 3 ILR 44 ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 ***(refd)***

Hotel Jaya Puri v. National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 ***(refd)***

Jimsburg Services Sdn Bhd v. Rostam Wahidin [1999] 2 ILR 324 ***(refd)***

Kilang Gula Felda Perlis Sdn Bhd v. Aman Abdul Khalid [1998] 5 MLJ 700 ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Malaysia Milk Sdn Bhd v. Ng Chee Meng [1987] ILR 175 ***(refd)***

Mat Jusoh Daud v. Syarikat Jaya Seberang Takir Sdn Bhd [1982] CLJ 366; [1982] CLJ (Rep) 562 HC ***(refd)***

Mersey Harbour Board v. Coggins & Griffith (Liverpool) Ltd and McFarlane [1946] 2 All ER 345 ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

R Ramachandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Sintat Rent-A-Car (M) Sdn Bhd v. Tan Tian Ser [1998] 2 ILR 562 ***(refd)***

Quah Swee Khoon v. Sime Darby Chd [2001] 1 CLJ 9 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20, 30(5)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, pp 9-10
Sarkar's Law of Evidence, 15th edn, 1999, pp 2178 & 2179

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For the 1st respondent - S Balan; M/s Azman Joseph & Assoc
For the 2nd respondent - K Selvakumaran; M/s Md Tajuddin & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Tamby Chik J:
The application before this Honourable Court is for the following:

(a) An application for *certiorari* to move this Honourable Court to quash the Award of the Industrial Court in Industrial Court Case No. 11/4-485/99, ie, Award No. 229 of 2002 dated 23 March 2002;

(b) Such further and other orders which this Honourable Court deems fit; and

(c) Costs.

Briefly the facts of the case are as follows: The Applicant was appointed by the second respondent as its Operations Executive with effect from 2 September 1997. As the Operations Executive of the second respondent, the applicant was responsible to supervise the second respondent's projects. At the time of his appointment, the second respondent was involved in a project known as the External Window Cleaning Project at KLCC ("the said project"). In view of the said project, the second respondent had sent the applicant to Houston, Texas for a two week building maintenance course from 18 September 1997 to 28 September 1997 ("the said training"). Prior to leaving for the said training, the applicant entered into an agreement to serve the second respondent, in respect of the knowledge acquired from the said training, for a minimum period of three (3) years on completion of the said training. The applicant was sent to Houston, Texas for the said training together with three (3) Operation Supervisors and returned upon completion of the said training on 30 September 1997. Upon his return, the applicant contacted his immediate superior, the Human Resource Manager, Major (Rtd) Ismail ("Major (Rtd) Ismail Abas") and was introduced by him to report for duty on 2 October 1997 at the second respondent's Head Office at Kelana Jaya. On 2 October 1997, the applicant together with the three (3) Supervisors reported for duty at the second respondent and attended a brief meeting at the office of Major (Rtd) Ismail

Abas in the presence of Capt. (Rtd) Ismail Adam, the Administration Manager of the first respondent ("Capt. Ismail Adam"). In this meeting, Major (Rtd) Ismail Abas informed the applicant that the said project had been taken over by the first respondent and that the services of the applicant and that of the three (3) supervisors had been transferred to the first respondent. When the applicant expressed his dissatisfaction about the instruction to transfer to the first respondent, both Major (Rtd) Ismail Abas and Capt. (Rtd) Ismail Adam assured him not to worry as both the management of the second respondent and the first respondent agreed to the said transfer. The applicant was further assured that the first respondent would issue a new letter of appointment, on it's letter head based on the applicant's existing terms and conditions with the second respondent. The applicant was then instructed to report for duty at the first respondent's site office on 6 October 1997 and to report to Capt. Ismail Adam. The applicant did not tender a letter of resignation to the second respondent nor was he instructed to do so. The applicant reported for duty at the first respondent site office at KLCC on 6 October 1997 together with the three (3) supervisors and reported to Capt. (Rtd) Ismail Adam. Capt. (Rtd) Ismail Adam officially announced the transfer from the second respondent to the first respondent (pp. 33 to 34 of exh. RBL5 attached to encl. 3). Capt. (Rtd) Ismail Adam then introduced the applicant to Tuan Hj. Azman Md. Top, the Director of the first respondent and the Chief Operations Manager of the said project ("COW2"). Pursuant to the introduction session, COW2 held a short briefing in respect of the status of the said project and its workforce which was insufficient at that material time. COW2 informed that the said project had yet to commence as there was no approval from the Management of KLCC. He then instructed the applicant to analyse the structure of KLCC as well as the techniques to clean the said building and to formulate a plan to carry out the cleaning activities. The actual cleaning activities of the said project only commenced sometime in the fourth week of December 1997 (item (7), p. 55 of exh. RBL5 attached to the encl. 3). Pursuant to his transfer to the first respondent, the applicant was based at the first respondent's Site Office at KLCC. The applicant was appointed as the Safety Manager and was instructed to report to Capt. (Rtd) Ismail Adam. At that material time, the applicant only had one (1) employee reporting to him namely Ahmad Md. Yusuf, who was appointed as Operation Executive (p. 37 of exh. RBL5 attached to encl. 3). As the Safety Manager, the applicant was responsible to train the employees at the said project about the safety procedures that ought to be complied with which amongst others included individual safety, safety in the operations of the Gondola as well as training in respect of the proper cleaning techniques. The applicant was also instructed by COW2, through Capt. (Rtd) Ismail Adam, to prepare the Safety and Health Procedures for the first respondent, which the applicant duly prepared and submitted to Capt. (Rtd) Ismail Adam on

22 December 1997 (pp. 59 to 112 of exh. RBL5 attached to encl. 3). At the time of his dismissal the applicant's last drawn basic monthly salary was RM2,900. The first respondent paid the applicant's salaries together with the statutory deductions from October 1997 to 15 January 1998 (pp. 39 to 41 of exh. RBL5 attached to encl. 3). However, despite repeated requests and reminder from the applicant, the first respondent never issued any letter of appointment to the applicant. On 12 January 1998, at about 3pm, the applicant was informed by Capt. (Rtd) Ismail Abas *vide* walkie-talkie that COW2 wanted to meet with the applicant the next day (13 January 1998) at the first respondent's Head Office at Kelana Jaya. On 13 January 1998, the applicant went to the first respondent's Head Office to meet with COW2. At the Head Office, the Finance Controller of the first respondent, Mr. Toh Wah Ken ("COW1") called the applicant into his office and informed the applicant that he had been instructed by COW2 to inform the applicant that his services would be terminated with effect from 15 January 1998, without assigning any reasons whatsoever. When the applicant inquired for the reasons for his termination, COW1 informed the applicant that he did not know the reasons and requested that the applicant meet with COW2. He also instructed the applicant to collect his salary on the third week of January 1998 (p. 58 of exh. RBL5 attached to encl. 3). Despite waiting for about half an hour, the applicant never got to meet with COW2 on 13 January 1998. Being dissatisfied with his termination from service, the applicant made representations at the Industrial Relations Department against the first respondent to seek the remedy of reinstatement under s. 20 of the Industrial Relations Act 1967. As no agreement was reached, the Honourable Minister of Human Resources referred the applicant's dispute with the first respondent to the third respondent ("the Industrial Court") for adjudication. The matter was registered as Industrial Court Case No. 11/4-485/99. As required the applicant filed his statement of case dated 5 January 2000 (pp. 1 to 9 of exh. RBL1 attached to the encl. 3). In response, the first respondent filed its statement in reply dated 14 March 2000 (pp. 19 to 21 of exh. RBL3 attached to the encl. 3). The first respondent in its statement in reply denied terminating the applicant and further denied that there was an employment relationship between itself and the applicant. The first respondent further contended that the applicant was offered to the first respondent by the second respondent on a lending of servant basis. In the circumstances, on 23 October 2000, the applicant made an application to join the second respondent as a party to the proceedings before the Industrial Court. By an order dated 23 October 2000, the Industrial Court ordered that the second respondent be joined as a party in the said matter and that an amended statement of case be filed by the applicant. As required, the applicant filed the amended statement of case dated 5 January 2000 (pp. 10 to 18 of exh. RBL2 attached to encl. 3). Subsequently on the first day of hearing (ie, 27 March 2001), para. 1 of the amended statement of

case dated 5 January 2000 was re-amended *vide* an order of the Industrial Court (p. 11 of exh. RBL2 attached to the encl. 3). The second respondent filed its statement in reply dated 14 December 2000 in response to the amended statement of case (pp. 22 to 24 of exh. RBL4 attachment to the encl. 3). The matter came up for hearing on 27 March 2001, 3 July 2001, 4 July 2001 and 14 July 2001. During the course of the proceedings before the Industrial Court, the parties produced exhibits (see exh. RBL5, RBL6 and RBL7 attached to the encl. 3) being copies of documents tendered and marked as exhibits on behalf of the applicant, the first respondent and the second respondent, respectively. The applicant filed his written submission dated 17 September 2001 on 18 September 2001 (pp. 138 to 179 of exh. RBL8 of the encl. 3). The first respondent filed its written submission dated 25 October 2001 on 27 October 2001 (pp. 180 to 205 of exh. RBL9 of the encl. 3). The second respondent filed its written submission dated 5 November 2001 on 5 November 2001 *vide* Award No. 229 of 2002 dated 23 March 2002 ("the impugned award"). The Industrial Court handed down an award against the applicant and dismissed the applicant's claim (pp. 218 to 232 of exh. RBL11 attached to the encl. 3). Being dissatisfied with the impugned award the applicant had applied for leave to apply for an order of *certiorari* to quash the entire impugned award. Pursuant to leave being granted by the court on 30 September 2002, the applicant now seeks an order of *certiorari* to quash the entire impugned award.

The Law On Certiorari

In order for the Judicial Review application here to succeed the applicant must demonstrate that the Industrial Court's decision suffers from any of the following infirmities as formulated by Lord Diplock in the celebrated case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 which was adopted by our Federal Court in the case of *R. Ramachandran v. the Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. The three grounds of review are:

(a) Illegality – that the decision-maker had failed to keep strictly within the perimeters of his powers;

(b) Irrationality or "Wednesbury unreasonableness" – that the decision was 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'; and

(c) Procedural Impropriety – that the decision-maker failed to observe basic rules of natural justice and/or procedural rules.

In *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 1 CLJ 276; ([1988] 1 CLJ (Rep) 183). Abdoolcader SCJ in delivering the majority decision of the Supreme Court stated as follows at p. 279 (pp. 186-187) of the report:

> But the Nat Bell reasoning, on which the result (rejection of 'no evidence' as a jurisdictional ground of review) was based, was wrong, and always had been. There have always been jurisdictional grounds of review for errors committed in the course of an inquiry validly commenced. Fraud, breach of natural justice and applying the wrong test are the easiest examples. These are all vitiating errors occurring in the course of an inquiry properly commenced, and yet Nat Bell theory of jurisdiction was not finally rejected until the House of Lords decision in *Anisminic Ltd v. Foreign Compensation Commission*. It is now possible but no longer necessary to treat factual error as unreviewable, and I would refer in this regard to the passage in my judgment in Chan Siew Kim (at p. 146) which I have adverted to earlier.
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> "The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my Judgment in this regard in *Tanjong Jaya Sdn Bhd v. Minister of Labour and Manpower & Anor* where in dealing with the question of unreasonableness I alluded (at pp. 129-130) to Lord Diplock's exegesis in *Bromley Borough Council v. Greater London Council & Anor* (at p. 821) in regard to decisions that, looked objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context of Dunn LJ's assertion in *Reg v. Secretary of State for the Home Department, ex p Asif Mahmood Khan* (at p. 1352) that "the categories of unreasonableness are not closed …' Mason J said in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (at p. 310) that it might be possible to challenge a decision which has:
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> > Failed to give adequate weight to a relevant factor of greater importance, or has given excessive weight to a relevant factor of no greater importance. The preferred ground on which this was done, however, is not the failure to take into account relevant considerations (or taking into account irrelevant considerations), but that the decision is "manifestly unreasonable'… (A) Court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

A line of cases has recently emerged which asserts a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. The first case was *Reg v. Deputy Industrial Injuries Commissioner, ex p Moore* in which Diplock LJ stated (at p. 488) that natural justice requires decision-makers to base decisions "upon material which tend logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of occurrence of some future event which would be relevant. It means that (the decision – maker) must not spin a coin or consult an astrologer …" Ex p Moore has been approved in Australia in *Minister for Immigration and Ethnic Affairs v. Pochi* (at pp. 688-690 per Deane J)."

In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, His Lordship Mr. Justice Gopal Sri Ram JCA after a review of the authorities stated:

Our response to counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that either Amanah Butler nor Swedish Motor Assemblies were cases that turned upon creditability of evidence. Such findings are in our judgement immunized from judicial review: *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235. Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for certiorari inquires into and disturbs findings of fact based on the creditability of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 3 CLJ 344 at p 348:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgement in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p. 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greter London Council & Anor* [1983] 1 AC 768 at p. 821; [1982] 1 All ER 153 at p. 159; [1982] 2 WLR 92 at p. 100).

> It is the ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon this court. Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise.

I am of the opinion that in the instant case the Industrial Court had acted on no evidence and had come to a conclusion which on the evidence no reasonable tribunal in similar circumstances could have reasonably come to. It is clear that the Industrial Court's decision is perverse and is not properly reasoned. The Industrial Court failed to consider several relevant matters and took into consideration several irrelevant matters. The impugned Award thus, suffers from irrationality or "Wednesbury unreasonableness and perversity. The functions of the Industrial Court under s. 20 of the Industrial Relations Act 1967 in dismissal cases is stated by Mohd Azmi, FCJ in the case of *Milan Auto Sdn. Bhd. v. Wong Seh Yen* [1995] 4 CLJ 449 of the report:

> As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.

In the case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 Eusoff Chin, CJ at p. 160 of the report held:

> What are the functions of the Industrial Court? We need only refer to three authorities.
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> In *Goon Kwee Phoy & Ors v. J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p. 136, Raja Azlan Shah CJM (as he then was) held:
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> > … Where representations are made and referred to the Industrial Court for enquiry, it is the duty of the Court to determine whether the termination or dismissal is with or without just cause or excuse.
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> The same learned judge held thus in *Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel Bar and Restaurant Workers & Anor* [1982] CLJ 460; [1982] CLJ (Rep) 124:
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> > … Its functions comprise an investigation of the facts, and lastly the application of the law to those findings.
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> In *L Michael & Anor v. M/s Johnson Pumps India Ltd* [1975] 1 LLJ 262 at p 268, the Supreme court of India held:

> The tribunal has the power and, indeed the duty X-ray the [termination] order and discover its true nature, if the object and effect, if the attendant circumstances and the ulterior purpose to dismiss the Employee because he is an evil to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simpliciter, such action is bad and is liable to be set aside.

It is pertinent to note that the Industrial Court is enjoined by s. 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regards to technicalities and legal form. In the instant case as both the first respondent and the second respondent denied that the applicant was its employee, the issues before the Industrial Court were:

(a) who was the applicant's employer;

(b) whether the applicant was dismissed; and

(c) whether the applicant's dismissal from service was with or without just cause or excuse.

1st Error

The Industrial Court erred in law and in fact when it decided that the second respondent was the applicant's true employer.

In handing down the award, the learned Chairman of the Industrial Court held that the second respondent was the applicant's true employer and that both the applicant and the second respondent had failed to discharge the burden of proving that the applicant was no longer employed by the second respondent and had become the employee of the first respondent. The learned Chairman of the Industrial Court erred in law in holding that the applicant failed to discharge the burden of proving that he was an employee of the first respondent as the applicant had in fact produced before the Industrial Court uncontroverted, oral and documentary evidence which, on a balance of probabilities, clearly show that the applicant was an employee of the first respondent. A perusal of the impugned award, clearly show that the grounds upon which the Industrial Court arrived at the aforesaid conclusion are as follows:

(i) that in the absence of the resignation letter by the applicant or termination letter from the second respondent, the relationship of employer-employee between the applicant and the second respondent had not been severed and hence the second respondent was still the applicant's employer;

(ii) that as the applicant testified that he was not satisfied with the transfer coupled with his alleged refusal to tender his resignation, showed that the applicant did not consent to have his employment transferred to the first respondent and thus, the applicant remained as the second respondent's employee; and

(iii) that the applicant's failure to call Capt. (Rtd) Ismail Adam to substantiate his contention that he was an employee of the first respondent, resulted in the testimony of the first respondent's witness (COW2) that the applicant was not the employee of the first respondent remaining unrebutted.

In respect of non-severance of the relationship of employer and employee between the applicant and the second respondent, the learned Chairman of the Industrial Court stated:

> From the evidence before the Court, it is clear documentary-wise that the Claimant's employer was the Second Company. The Claimant remained as the Second Company's employee since he had not put in his resignation letter to the Second Company when he was told by them to do so at the time when he was instructed to go to the Company. Neither did the Second Company issue him with a termination letter after he had left for the Company. In this circumstances, in the absence of the resignation letter or the termination letter the letter of appointment issued by the Second Company prevailed and hence the Second Company was still the Claimant's employer.
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> …
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> With the absence of the resignation letter by the Claimant or any letter of termination from the Second Company to the Claimant the relationship of employer-employee between the two of them had not been severed.

I have to first point out that the Industrial Court has rejected the applicant's testimony on an erroneous basis in the impugned award in the following passages of the impugned award at pp. 226 and 227 of exh. RBL1, encl. 4]:

> Proceeding further from the said submission by counsel for the Second Company and the particular minutes of meeting of 6 October 1997, and to the testimony of the Second Company witness that he did instruct Major (Rtd) Ismail Abas to request for the Claimant's resignation and was told about Claimant's refusal to resign, a conclusion can thus be made that in these circumstances the Claimant still remained as an employee of the Second Company.

> The Claimant in his testimony denied that he had been told by the Second Company or the Company that he had to resign from the Second Company. This denial is not acceptable because of the unchallenged testimony of the Second Company Witness about the Claimant's refusal to resign. Also it is unreasonable and unbelievable that the Second Company did not ask the Claimant to tender his resignation since as claimed by them they had handed over window-cleaning project including the employees they employed for this project to the Company. Further, the Claimant by including the minutes of the meeting of 6.10.1997 in the Bundle of Documents and being present during the meeting should be aware that a resignation would be proper and had to be given so as to show his consent to be under the management of the Company. This adds credence to the Company's case that the transfer of the Claimant is on the lending of servant basis.

It is pertinent to note that the testimony of the second respondent's witness in that the applicant had refused to tender his resignation letter was in fact challenged in the course of his cross-examination by the applicant, although the said witness (COW1) had maintained his testimony (see p. 52, lines 17 to 20 of exh. RBL1 attached to encl. 4). It is noted however that the applicant was not cross-examined by the second respondent on his testimony that during the meeting on 2 September 1997 with Major Ismail and Capt. (Rtd) Ismail Adam, he was not asked to tender his resignation. Neither was it suggested to the applicant in the course of his cross-examination by the second respondent that the applicant had refused to resign despite being asked to do so. In the circumstances, the Applicant's testimony in this respect remained uncontroverted and as such ought to be accepted as the truth. In *Sarkar's Law of Evidence* 15th edn, 1999 at pp. 2178 and 2179 it is stated:

> The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of witness's evidence. Generally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examination how much of the witness's version of it he accepts and how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account. (*Flanagan v. Fahy* [1918] 2 IR 361, 388-89 CA; *Browne v. Dunn, infra; Odgers' Pleadings*, 13th edn, p. 261; *Powell* 9th edn, p. 531: *Wig* Vol. 2 para 1371; *Phipson*, 11th edn, p. 649; see also *Chunilal v. H F Ins Co.*, A 1958 Pu 440; *Babulal v. Caltex (India) Ltd, A* [1967] C 205]. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice (*Carapiet v. Derderiem,* A [1961] C 359).

a It is thus I view that the failure of the second respondent to challenge the applicant's testimony would by the aforesaid principle, be deemed as an acceptance of the truth of the applicant's testimony by the second respondent. Therefore the Industrial Court has arrived at a perverse and irrational decision when it refused to accept the applicant's unchallenged testimony that he was b not told by the second respondent or the company to tender his resignation on the erroneous basis that the applicant failed to challenge the testimony of second respondent's witness. The Industrial Court failed to appreciate that it was the applicant's testimony which was unchallenged and not that of the second respondent's witness as it erroneously found. As regard the issue relating to c resignation and termination, it is observed that despite the absence of a resignation from the applicant or a termination letter from the second respondent, the applicant's contract of employment with the second respondent was terminated with effect from 6 October 1997 when his services were transferred to the first respondent. In the instant case it is undisputed that the Applicant was appointed by the second respondent with effect from 2 September 1997 d as Operations Executive. Subsequently on 2 October 1997, the applicant was instructed by the second respondent that he was transferred to the service of the first respondent on the same terms and conditions, with effect from 6 October 1997, as a result of the take-over of the said project by the first respondent. The applicant's testimony that he was transferred from the second e respondent to the services of the first respondent on the same terms and conditions was corroborated by the second respondent's witness when he testified as follows (p. 51 of exh. RBL1 attached to encl. 4):

> Koll (M) handed over this exterior cleaning project to R.M. Top Holdings on 1.10.1997. All personnel agreed that they were to be absorbed by R.M. Top Holdings. As the result of this project being handed to R.M. Top Holdings all employees involved in the project were transferred to R.M. Top Holdings on the same term and condition of their employment.

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It is pertinent to further note that the the applicant testified that he was informed g by Capt. (Rtd) Ismail Adam and Major (Rtd) Ismail that the transfer to the first respondent was agreed upon by both the management of the respondent and assured him that the first respondent would issue him a letter of appointment on the same terms and conditions as that which he had with the second respondent. The applicant went on to testify that he then reported to work at the first respondent's site office with effect from 6 October 1997 (pp. h 61 and 62 of exh. RBL1 attached to encl. 4). The documentary evidence produced by the applicant before the Industrial Court further impliedly corroborated the agreement between the first respondent and the second respondent (pp. 6 to 31 of exh. RBL5 attached to encl. 4). In the circumstances,

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it can be inferred from the abovementioned facts that there was an agreement between the second respondent, the applicant and the first respondent to transfer the services of the applicant to the first respondent. The effect of such an agreement terminated the applicant's contract with the second respondent. As such, the findings of the learned Chairman of the Industrial Court that the relationship of the employer-employee between the second respondent and the applicant did not come to an end, I think is an erroneous finding. The second respondent had on 2 October 1997 explicitly repudiated the applicant's contract of employment and the applicant affirmed the repudiation by the second respondent when he went on the transfer to the first respondent and reported to work at the first respondent's site with effect from 6 October 1997. This fact is further fortified by the applicant's uncontroverted testimony that with effect from 6 October 1997, he was based at the first respondent's site, carried out the works as instructed by the first respondent and that he was under the absolute control of the first respondent with effect from 6 October 1997. I think it can be implied from the conduct of the applicant and the second respondent, that the employer and employee relationship between them had been terminated by mutual consent with effect from 6 October 1997, when the applicant went on transfer to the first respondent. In this respect the learned Chairman of the Industrial Court made the following finding (pp. 229, line 5 to 20 of exh. RBL1 of the attachment to encl. 4):

> The evidence adduced by the Company on this issue was that the services of the Claimant was no longer required by them and hence he was asked to go back to the Second Company. Through COW1, evidence was also adduced that he did discuss with Menon from the Second Company about the employees of the Second Company who were returned to them. COW1 also went on to say that he clarified with Menon that these employees should report back to the Second Company and the response he got from Menon was that there was no commitment from them (ie, the Second Company) to take these employees back.
>
> The above evidence of COW1 about his discussion with Menon was not touched at all when Menon (ie, the Second Company Witness) testified in court. Neither was it suggested to COW1 in the course of his cross-examination by the counsel for the Second Company that the discussion between him (ie COW1) and Menon had never taken place. With such stand taken by the Second Company then the evidence of COW1 about the discussion remained unrebutted and hence admitted by them that they had been informed about the Company returning the employees including the Claimant to them.

In view of the fact that the Industrial Court has accepted the testimony of the first respondent's witness (COW1) that he was informed by the second respondent's witness that there was no commitment from the second respondent to take the employees back, I come to the conclusion that its finding that the employer-employee relationship had not been severed is flawed. The Industrial Court not only arrived at a perverse decision but at a decision which was diametrically opposed to the evidence on record when it held that with the absence of the resignation letter by the applicant or any letter of termination from the second respondent to the applicant, the relationship of employer and employee between the second respondent and the applicant had not been severed. The relationship of employer-employee between the applicant and the second respondent terminated upon the applicant's transfer to the first respondent with effect from 6 October 1997. It must be remembered that the first respondent had absolute control over the applicant. I am of the view that the learned Chairman's findings in this respect not only goes against s. 30(5) of the Industrial Relations Act 1967 but is so devoid of any plausible justification that no reasonable person or tribunal could have reached them.

As regards the issue of the lack of consent, the learned Chairman of the Industrial Court held *inter alia* that (pp. 227 and 228 of exh. RBL1 attached to encl. 4):

> …
>
> This court is not willing to readily accept that the Claimant was the Company's employee in the absence of some evidence of consent on the part of the Claimant. The Court is persuaded by the decision in the case of *Mersey Dock and Harbour Board v. Loggings & Griffiths (Liverpool) Ltd. And Farlane* [1946] 2 All ER 345. Though the said decided case the question to be determined by the House of Lords was whether the general employer of the crane driver or the hirers were liable for the employee's negligence, his Lordships did discuss about the burden on the employer to establish that such a transfer of servant had been effected. Lord Macmillan in his judgment at p. 350, had said as follows:
>
> > Servants cannot be transferred from one service to another without their consent, and, even where consent may be implied, there will always remain a question as to the extent and effect of the transfer.
>
> The fact before this Court is that the Claimant has not resign from the Second Company. Besides not tendering his resignation, the Claimant in his testimony had stated that he was not satisfied with the transfer. His testimony on this matter is "Saya rasa terkejut kerana pertama kali saya mendengar RM Top Holdings terlibat dalam projek ini. Walaupun saya rasa kurang berpuas hati kerana kontrak yang saya tandatangani ialah dengan Koll (M) tetapi kami

ditukarkan dan diarahkan bekerja dengan RM Top Holdings". This testimony of the claimant goes to show the lack of consent on his part and that he was with the Company because of the instruction from the Second Company who employed him. With the Claimant's testimony as stated and his refusal to tender his resignation, it shows that the Claimant did not consent to have his employment transferred to the Company. As such the Claimant should not be said to be the Company's employee. He remained as the Second Company's employee since he had not given his consent.

It is pertinent to note that in arriving at the above conclusion the Industrial Court relied on:

(i) the applicant's testimony wherein he had testified that he was dissatisfied; and

(ii) the applicant's alleged refusal to resign from the second respondent.

It is conceded that a transfer of an employee from one employer to another cannot take place without his consent, express or implied. However, I think that such consent may be inferred from the employee's conduct. In the instant case consent on the part of the applicant may be implied from his conduct when he went on the transfer with effect from 6th October 1997 and continued to report for duty at the first respondent's site, without any further contact or relationship with the second respondent. This conduct on the part of the applicant clearly showed his consent to be under the management of the first respondent. It is further to be noted that the learned Chairman of the Industrial Court held that as the applicant testified that he was dissatisfied with the transfer, that testimony showed the lack of consent on his part. The Industrial Court misdirected itself on the evidence in arriving at this finding as the Industrial Court failed to consider the entire testimony of the applicant on the issue as well as his conduct. The applicant testified that (pp. 61 and 62 of exh. RBL1 attached to encl. 4):

Saya rasa terkejut kerana pertama kali saya mendengar R.M. Top Holdings terlibat dalam projek ini. Walaupun saya rasa kurang berpuas hati kerana kontrak yang saya tandatangani ialah dengan Koll (M) tetapi kami ditukarkan dan diarahkan bekerja dengan R.M. Top Holdings. Saya ada sampaikan ketidakpuasan hati saya kepada Mejar Ismail pada masa itu, dan Mejar Ismail dan Kapt. Ismail telah menyakinkan saya dan rakan-rakan untuk jangan bimbang kerana kedua pihak atasan Koll (M) dan R.M. Top Holdings telah bersetuju mengenai perpindahan ini. Saya diyakinkan lagi bahawa R.M. Top akan mengeluarkan surat perlantikan yang baru mengikut terma-terma yang sedia ada menggunakan 'letterhead' R.M. Top Holdings.

A detailed examination of the applicant' testimony revealed the Industrial Court failed to appreciate that:

(i) the applicant had in fact testified that although he was initially dissatisfied with the transfer but, upon being given the assurance that:

(a) the management of both the first respondent and the second respondent had agreed to the transfer; and

(b) that the first respondent would issue a new letter of appointment on the same terms and conditions, the applicant reported to the first respondent with effect from 6 October 1997.

It is plain that the applicant had, by his conduct of going on the transfer, agreed and consented to the transfer. Any dissatisfaction the applicant may have had prior to 6 October 1997 is negatived by his conduct of going on the transfer to the first respondent. This is fortified by the applicant's subsequent testimony that pursuant to his transfer to the first respondent he no longer worked with the second respondent (p. 76 exh. RBL1 attached to encl. 4); and

(ii) that the applicant's testimony that he was not requested by the second respondent to tender his resignation was unchallenged by the second respondent in the course of cross-examination and hence is deemed admitted by the second respondent.

The learned Chairman of the Industrial Court had made the following finding in respect of the applicant's testimony:

> The Claimant's testimony that assurances were given and he had been convinced by the officer of the Company (ie, by Capt (Rtd) Ismail Adam) and the Officer from the Second Company (ie, Major (Rtd) Ismail Abas) that his transfer had been agreed upon by both the companies and a new letter of appointment would be issued by the Company, also could not stand in view of his testimony during the cross-examination by counsel for the Company where the Claimant stated "Bila diarahkan pergi ke RM Top say menerimanya sebagai pertukaran tempat bekerja bersama-sama dengan kontrak yang saya telah tandatangan dengan Koll. Maksudnya terma-terma kontrak saya dengan Koll masih kekal semasa saya bekerja dengan RM Top". This testimony goes to show that when he (the Claimant) went to the Company it was a transfer in respect of his working place and the terms and conditions of his employment with the Second Company remained while he was with the Company. This testimony of his is thus inconsistent and also made no sense of his testimony that a letter of appointment had been promised to him.

In arriving at the aforesaid finding the Industrial Court fell into error as it misunderstood the testimony of the applicant in this respect when it failed to consider other relevant matters. The full context of the Applicant's testimony on the said issue is as follows (pp. 71 and 76 of exh. RBL1 attached to encl. 4):

> Bila diarahkan pergi ke RM Top, saya menerimanya sebagai pertukaran tempat bekerja bersama-sama dengan kontrak yang saya telah tandatangani dengan Koll. Maksudnya terma-terma kontrak saya dengan Koll masih kekal semasa saya bekerja dengan RM Top.
>
> Selepas saya berpindah saya tidak lagi bekerja dengan Koll. Saya tidak diminta menandatangani surat perletakan jawatan.

An examination of the aforesaid testimony of applicant coupled with his other testimony, clearly showed that the applicant's testimony did not show that the applicant testified that he went on the transfer to the first respondent on the same terms and conditions as existed between the applicant and the second respondent. The fact is that the applicant went on to testify that pursuant to the transfer, he no longer worked with the second respondent. It is clear that the impugned Award is erroneous as the purported reasons and/or grounds in which the Industrial Court had relied on to arrived at its finding is diametrically contrary to the evidence on record and as a consequence of which the Industrial Court's finding on this issue suffers from infirmity on the grounds of perversity and irrationality.

The Industrial Court had relied on the English case of *Mersey Harbour Board v. Coggins & Griffith (Liverpool) Ltd and McFarlane* [1946] 2 All ER 345 to arrive to the conclusion that the applicant remained the second respondent's employee for lack of consent to the transfer. It is noted that the case of *Mersey Harbour Board* is in fact a case which established that the onus of proof rests on the general or permanent employer to shift the *prima facie* responsibility for negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service of servant. It is further to be noted that in *Mersey Harbour Board* it was undisputed by the general employer that there was a lending of servant to the hirer and the employee were engaged and paid by the general employer. The only issue was as regards the liability of the parties to the contract for the negligence of the lent employee. Whereas in the instant case the fact of lending of servant had been rebutted by the applicant and the second respondent as both the applicant and the second respondent have proven, on a balance of probabilities, that the applicant's services had been transferred to the first respondent; that the applicant had consented to the transfer to the first respondent by his subsequent conduct; that the first respondent was the ultimate pay master of the applicant and that with

effect from 6 October 1997, the entire and absolute control over the applicant had passed to the first respondent. I think the Industrial Court failed to consider the factors as stated in Mersey Harbour Board in arriving at its finding that the Second Respondent was the applicant's true employer. In Mersey Harbour Board, Lord Porter held thus:

> Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed all these questions have to be kept in mind. The expression used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific order, or whether any specific orders, were given, but who is entitled to give the order as to how the work should be done.

Therefore, the Industrial Court's finding that the applicant remained as the employee of the second respondent is perverse and irrational. As such, the impugned Award suffers from perversity and irrationality or the "Wednesbury unreasonableness".

The Industrial Court arrived at a perverse decision when it held that in the absence of the resignation letter by the applicant or termination letter from the second respondent, the relationship of employer-employee between them had not been severed and this adds credence to the first respondent's case that the transfer of the applicant is on the lending of servant basis. I think that the applicant had proven, on a balance of probabilities, that there was an implied contract of service which existed between him and the first respondent. In *Kilang Gula Felda Perlis Sdn Bhd v. Aman bin Abdul Khalid* [1998] 5 MLJ Supp 700 wherein the court stated:

> The Claimant began his employment with the Federal Land Development Authority ("Felda") in 1968 and was seconded to Kilang Gula Felda Perlis Sdn. Bhd. ("the Company") in 1973. On 16th July 1974, he was appointed as the general manager of the Company. The Company paid the Claimant's salary as its employee, EPF contributions and relevant tax deductions from 1974 onwards. The Claimant remained in that position for more than 10 years but in 1986 he decided to pursue further studies to become a lawyer. The

Claimant's application for two years' no-pay leave from Felda was approved. Prior to the Claimant leaving for his studies, Felda offered the Claimant the benefits of the amendments to the Statutory and Local Authorities Pensions (Amendment) Act 1985 ("the Pension Act") to retire from Felda and to continue with his employment with the Company. The Claimant exercised the option offered and this was approved by the Prime Minster under s. 13 of the Pension Act effective from 1st October 1986. Upon his return from his studies in 1989, the Claimant reported for duty to the Company whereupon he was not appointed to his former position as general manager. Instead, the Claimant was offered the temporary position as a public relations officer on a month-to-moth basis. The Claimant's remuneration was reduced from RM7,400.00 to RM4,000.00 per month. The Claimant was also instructed to report to the present general manager. The Claimant rejected the offer and considered himself to be constructively dismissed without just cause an excuse. Representations were made to the Director General of Industrial Relations under s. 20 of the Industrial Relations Act 1967 ("the Act"). Before the Industrial Court, the Company raised, *inter alia*, a preliminary objection that the Claimant was not a "workman" under s. 20 of the Act as the Claimant was merely on secondment and not an employee of the Company and that there was no contract of service between the Claimant and the Company at all material times. The Industrial Court dismissed the preliminary objection. The Company applied to the High Court to quash the decision of the Industrial Court.

In dealing with the issue whether or not there was a contract of service between the Claimant and the Company, the High Court stated inter alia at pages 705 to 707 of the Report:

Who is a "workman"? Section 2 of the Act defines 'workman' as:

> … any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment had led to that dispute.

Whereas:

> 'contract of employment' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman; …

> There is high authority for the proposition that a flexible approach is the correct test to be applied in determining whether a Claimant is a workman under the Act. The Act, being a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen, must receive a liberal and not a restricted or rigid interpretation. It was not the intention of Parliament to assign a fixed or rigid meaning to this expression (per Gopal Sri Ram JCA in the Federal Court case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687). The determination whether a particular Claimant is a workman under the Act is a mixed question of fact and law it is for the Industrial Court to determine this question (*Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304). It is trite law that the Industrial Court is required to decide a case in accordance with equity and good conscience without regard to technicalities and legal forms (s. 30(5) of the Act: *Harris Solid State (M) Bhd & Ors v. Bruno Gentil s/o Perera & Ors* [1996] 4 CLJ 747).

Applying the above principles to the present case, I hold that the learned chairman or the Industrial Court is right in finding the Claimant an employee and workman of the Company from 1st October 1986, and a contract of service between the Claimant and the Company was brought into existence on that date.

The Company had paid the Claimant's salary as its employee since 1st August 1974 onwards. The Company also paid the Claimant's EPF contribution and made the relevant income tax deductions as the employer of the Claimant.

It is against good conscience and equity on the part of the Company to abandon and disown the Claimant on his return from study leave and after servicing the company for 22 years, and to insist that the Claimant was not its employee merely because he had retired from Felda and that there was no express contract of service between the Claimant and the Company.

I agree wholly with the finding of the learned chairman when he said at p. 12 of this award:

> It is therefore not in accord with good conscience and equity for company, its directors and management to plead ignorance or turn a blind eye to the glaring fact the Claimant, its general manager, was by the exercise of the aforesaid option absorbed into the permanent employment of the company and would continue in the service of the company as its general manager upon his return from his legal studies.

> A Contract of service under the Act need not be in writing. It can be implied. Technicalities and legal forms have no place industrial adjudication (s. 30(5)) … in determining whether the Claimant was a workman and whether a contract of service between the Company and the Claimant (Hoh Kiang Ngan). Under the Federal Constitution, the Claimant has a fundamental constitutional right to livelihood, and that right cannot be brushed aside conveniently by the Company, (See *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665). In the circumstances of this case, there is ample evidence both oral and documentary before the Industrial Court to support its conclusion.

In the circumstances of the instant case I come to the conclusion that there are ample evidence, both oral and documentary, to support the conclusion that there was an implied contract of service which existed between the first respondent and the applicant. The contract existed when the applicant went on the transfer to the first respondent with effect from 6 October 1997. Speaking of the characteristics of the relationship of an employer and employee, *Halsbury's Laws of England*, 4th edn, pp. 9 and 10 states:

> Characteristics of the relationship. There is no single test for determining whether a person is an employee; the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status.
>
> The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration.
>
> The way in which the parties themselves treat the contract and the way in which they describe and operate it is not decisive; and a court or tribunal must consider the categorisation of the person in question objectively. Thus a person could have been described as self-employed during the currency of the engagement but upon its termination claim to have been in fact an employee for the purpose of claiming unfair dismissal, though such a course of action could have unfortunate taxation implications.

> In a case of what is frequently referred to as "a typical employment", such as temporary or causal work, sporadic work or home working, it may be appropriate, when deciding upon the employment status of an individual subject to such a regime, to consider whether there is sufficient mutuality of obligations to justify a finding that there was a contract of employment.

Salleh Abas FCJ (as he then was) in *Mat Jusoh bin Daud v. Syarikat Jaya Seberang Takir Sdn Bhd.* [1982] CLJ 366; [1982] CLJ (Rep) 562 examined in some detail the appropriate test to determine the existence of the relationship of master and servant and Salleh Abas FCJ (as he then was) had this to say:

> The notion of control as a test to determine the existence of relationship of master and servant has lost a good deal of its importance because under modern conditions no control as to how work is to be done can be directed to such professionally trained employees as engineers, architects, lawyers, managers, doctors and many others: *Morren v. Swinton & Pendlebury BC* [1965] 1 WLR 576,582. This notion is also becoming unrealistic because the majority of employers today are corporate entities who have to act through human agencies. Thus the absence of control is no longer conclusive as to the existence or otherwise of the relationship of master and servant. Various attempts were made at finding a satisfactory test. One such test is stated by Denning LJ in *Stevenson, Jordan and Harison Ltd v. Macdonald* [1952] 1 TLR 101, 111 as follows:
>
> > It is often easy to recognize a contract of service when you see it, but difficult to say wherein the distinction lies. A ship's master, a chauffeur and a reporter or a staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man and a newspaper contributor are employed under a contract for service. One feature which seems to run through the instances is that under a contract of services a man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract for services, his works, although done for the business, is not integrated into it but is only accessory to it.
>
> This test was repeated by Denning LJ in *Bank Voor Handell en Scheepvart NV v. Slatfor* [1952] 1 QB 248, 295 as follows:
>
> > The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization.

In another part of his judgment in *Mat Jusoh*'s case *(supra)* Salleh Abas FCJ (a he then was) continued in these words:

Another test was suggested by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 DLR 161 as being appropriate in some cases. This is a composite test involving elements of: (1) control; (2) ownership of the tools; (3) chance of profit; and (4) risk of loss. In other works the test which can be applied should be wide enough to cover the taking of account of investment and risk. Thus he who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. Such person in fact could be described as carrying on his own business: *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2 QB 497, 521 per MacKenna J at p. 521.

Applying the test of organization laid down by Denning LJ quoted above, it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendants' business. Lim procured the workmen for the defendants' business, and the workmen cut or split the logs also for the business of the defendants. Under no circumstances could they be held to be working for Lim. After all the essence of a contract of service is the supply of labour and skill by a servant to the master. It is to the defendants and not to Lim that these workmen supplied their service and skill. Even on the question of control, the ultimate authority to decide whether a log was to be sawn or not and how may logs were to be sawn obviously resided with the defendants who conveyed their decisions through their supervisors. In the circumstances I therefore have no hesitation to hold that the Plaintiff was an employee of the defendants.

In *Jimsburg Services Sdn. Bhd. v. Rostam Wahidin* [1999] 2 ILR 324, the Industrial Court in dealing with the issue of the identity of the claimant's employer, stated thus at pp. 333 and 334 of the Report:

The issue who is the real employer is often resolved by asking who had the power to hire and fire an employee and to control and to direct an employee as to the work he is engaged to perform. There is scant evidence on this issue. The Claimant was hired by the late Alexander David. It does also appear that Alexander David, deceased, was the person who had a say concerning the Claimant's duties and responsibilities. The above alone, however, leaves the issue unanswered as the deceased might well have been acting on behalf of either of the companies. However, there is the evidence that JC was the ultimate paymaster. The Court is of the opinion that where the evidence of either JS and JC being the real employer appears to be evenly balanced the fact that it was JC which paid the Claimant's salary, reimbursed JS for the Claimant's work-related expenses and made statutory contributions to the EPF would be a significant factor leading the court to a finding that JC was the Claimant's real employer.

> In the entire facts and circumstances of the case, the Court finds that the vehicle which was used by Alexander David, deceased, to engage the Claimant for the Jimsburg East Malaysia operations was JC and not JS. The documentary evidence pertaining to the Claimant's remuneration initially appears to point to an engagement of the Claimant in the capacity as general manager of JS. However, the company as shown that the sums paid to the Claimant by JS were invoiced to JC and were reimbursed accordingly by JC.
>
> I will be observed that JC's appointment of the claimant as executive director of JC was effected almost contemporaneously on 5 April 1995 (Exh J11). The bulk of the relevant documents relating to the Claimant's expenses which have relevance to the issue of the claimant's employment status originated from JS in connection with his appointment as general manager of JS but the same arrangements for reimbursement of the Claimant's salaries by JC in connection with his appointment as executive director of JC applied. What is of further significance too is the fact that JC made contributions towards the EPF in favour of the Claimant.
>
> The fact that it was JS which initially paid the Claimant's salary does not in the circumstances of this case make JS the Claimant's employer. It is not unusual that companies related by common shareholders have such kinds of inter company arrangements for disbursing funds and sharing staff and personnel. In this case, however there was an overriding reason for JC rather than JS to be the employer of the Claimant.

I am of the view therefore that in dealing with the issue who is the real employer the following significant factors must be considered by the Industrial Court:

(a) the power to control and direct the applicant as to the work performed;

(b) the applicant is part and parcel of the organization;

(c) the method of payment; and

(d) the power to hire and fire the applicant.

In this respect, the Industrial Court stated as follows (pp. 223 to 224 of exh. RBL11 attached to encl. 3):

> The Claimant as well as the Second Company did bring up the fact that from October 1997 onwards, salaries and statutory contributions of the Claimant had been paid by the Company. Also factors that the Claimant since October 1997 was at the Company's premise and carrying out the works as instructed by the Company; and the Company and control over the Claimant were raised to support the contention that the claimant was the Company's employee. It is undeniable that all these factors were indicative of the Claimant being the

employee of the Company. However with the Company's contending that the Claimant was merely transferred to them on the lending of servant basis and was not their employee further evaluation of the witnesses' testimony had to be done.

As regards the issue of control, the Industrial Court stated *inter alia*:

As for having the Claimant at the Company worksite and giving instructions about works to be done, the Company had adduced evidence through COW2 that upon the transfer of the claimant and the others the company wanted to assess their performance during their first few months before taking them as their employees. This piece of testimony from COW2 remained unchallenged. It goes to show that despite the Claimant doing the work at the company's site, it does not necessary mean that the Company had taken him as their employees. This seems to be so when coupled with the fact that no letter of appointment was issued by the company, although the claimant had been with the Company for a period exceeding three months.

The Industrial Court arrived at an erroneous finding that the testimony of the first respondent's witness (COW2) remain unchallenged when in fact and in reality the said testimony was challenged by the applicant during cross-examination. The first respondent's witness (COW2) in the course of cross-examination by the applicant stated as follows (pp. 37 and 38 of exh. RBL1 of attached encl. 4):

Saya membuat penilaian terhadap keseluruhan kerja dan bukan penilaian terhadap individu. Tidak benar keterangan saya dalam pemeriksaan utama yang saya menilai prestasi kerja pegawai.

Saya tidak menilai prestasi kerja 'Claimant'.

It is pertinent to note that the alleged reason for placing the applicant at the first respondent's site was in fact never suggested to the applicant in the course of his cross-examination by the first respondent and therefore the evidence of the applicant that he was under the absolute control and direction of the first respondent remained unrebutted and admitted by the first respondent, without any qualification and explanation as alleged. In light of the foregoing the Industrial Court acted perversely and irrationally in accepting the alleged reason of the first respondent as a basis for finding that the applicant was not taken by the first respondent as an employee, when the said testimony of the first respondent's witness (COW2) was proven to be untrue in the cross-examination by the applicant. The unequivocal documentary evidence produced by the applicant that he was in fact part and parcel of the first respondent's organisation proved this. (pp. 33 and 37 of exh. RBL1 attached to encl. 3).

Thus having regard to the testimony of the first respondent's witness (COW2) referred to by the Industrial Court, it is clear that his testimony is inconsistent with the first respondent's contention that the applicant was transferred on a lending of servant basis. This is because on the one hand the first respondent contended that the applicant was transferred to the first respondent on a lending of servant basis, whereas on the other hand, the first respondent through (COW2) appear to state that the transfer was on an assessment basis to decide whether or not to retain the employee (including the applicant) as an employee of the first respondent. And as regards the method of payment, I come to the conclusion that there is uncontroverted evidence that the first respondent was the ultimate paymaster. Another significant factor is the fact that the first respondent made contributions towards EPF in favour of the applicant. In this respect, the Industrial Court held as follows (p. 224 of exh. RBL11 attached to encl. 3):

> The Company did give an explanation why the Company paid the Claimant' salary and made the necessary statutory contribution. This could be seen in the testimony of their accountant at that time (ie, COW1). According to this witness, payment of salaries and statutory contributions were made to the Claimant since it was the practice of the Company to pay for services rendered by anyone to the Company and as for the statutory contributions since it was required by law that deductions for contribution for EPF to be made, so automatically the Company did the deduction. With this explanation given, nothing adverse should be made about the making of these payments since this nature of payments is also applicable in a situation of the lending of servant basis.

The Industrial Court arrived at a perverse finding when it accepted the first respondent's explanation for the payment as it failed to appreciate the uncontroverted fact that the first respondent had in fact reimbursed the second respondent for all salaries paid and expenses incurred by the second respondent in respect of the employees (including the applicant) who were involved in the said project (pp. 136 & 137 of exh. RBL7 attached to encl. 3). The second respondent's witness (COW1) had testified as follows (p. 48 of exh. RBL1 attached to encl. 4):

> We did not pay them salary effective from 1.9.1997. Up to September 1997, Koll (M) issued the cheque for their salary. In October onwards we did not pay them any salary. As for as their positions are concerned their transfer or absorption by RM Top took effect from 1st September. Although we paid the salary for them in September, the amount was reimbursed by RM Top Holdings. For most of expenses related to the exterior window-cleaning project, we were reimbursed by RM Top Holdings.

The testimony of the second respondent's witness above was not challenged by the first respondent during cross-examination. Therefore this testimony ought to be taken as having been accepted by the first respondent as the truth. In the light of the foregoing, the testimony of the first respondent's witness (COW1) explaining the reasons for the payments made by the first respondent does not hold water. The Industrial Court had arrived at a perverse and irrational decision when it accepted this testimony and refuse to consider the significant factor of the first respondent being the ultimate paymaster, which was indicative of the applicant being an employee of the first respondent. As regards the non-issuance of a letter of appointment by the first respondent, the first respondent had in fact committed an act of unfair labour practice. The Industrial Court misdirected itself in law and in fact when it failed to make a finding that the omission and failure on the part of the first respondent to issue any letter of service to the applicant, should be construed adversely against the first respondent in the face of unequivocal evidence of employer and employee relationship that was adduced by the applicant.

In *Sintat Rent-A-Car (M) Sdn. Bhd v. Tan Tian Ser* [1998] 2 ILR 562 the learned Chairman held thus at p. 567:

> To begin with, *prima facie,* it is unfair labour practice for an employer not to define the rights and obligation of an employee that will govern the relationship of employer/employee *inter se,* even if the employees is also partly to be blamed for not insisting on one. It is unfair because it is open to abuse, and invariably being the employer, he will have the "upper hand" in case of a dispute, in the absence of a written document.

In the instant case the first respondent intentionally omitted to issue any written contract to the applicant so that it can terminate the applicant's contract as and when it wished. This fact is evident from testimony of the first respondent witness (COW1) that the applicant came over to the first respondent to be assessed on his expertise on high rise cleaning. But yet, no one from the first respondent informed the applicant that his transfer to the first respondent was on an assessment basis and that he was not employed by the first respondent nor was there a letter to that effect.

In respect of the failure of applicant to call Capt. (Rtd) Ismail Adam, the learned Chairman of the Industrial Court held as follows (p. 225 of exh. RBL11 attached to encl. 3):

> Though the claimant in his testimony had stated that he had asked for his letter of appointment from the company several times and assurances were given to him about his employment by the officer from the company (ie, from Capt (Rtd) Ismail Adam) this was insufficient to substantiate his allegation that he has been accepted as an employee of the Company. It would be a

totally different matter if the Claimant has called Capt (Rtd) Ismail Adam to testify that he (ie the Claimant) had been appointed as the Company's employee. If such testimony from Capt (Rtd) Ismail Adam is available it could possibly throw a different light on the Claimant's position in the Company since it would create doubts to what had been told by COW2 in court that the Claimant was not the Company's employee. Hence with the Claimant's failure to call Capt (Rtd) Ismail Adam to substantiate his allegations, COW2's testimony remained unrebutted.

In arriving at the above decision the learned Chairman failed to appreciate that the applicant had discharged, on a balance of probabilities, the burden placed on him to prove that he was an employee of the first respondent, when he not only testified to that effect but further produced uncontroverted documentary evidence to support his contention. The first respondent had the burden of rebutting the applicant's case but had failed to do so by producing both Capt (Rtd) Ismail Adam and Zulkifle Hj Zimat as a witnesses and any documentary evidence, despite being in a position to do so. It is interesting to note that the first respondent never produced Capt. (Rtd) Ismail Adam nor Zulkiflee Hj Simat as witnesses despite the fact that the first respondent witness (COW2) confirmed that the former was still working with the subsidiary of the first respondent which took over the said project whereas the first respondent witness (COW1) confirmed that the latter was still working with the first respondent. Both first respondent witnesses (COW1 and COW2) were not based at the first respondent's site office at KLCC. Neither of them were the applicant's immediate superior in the first respondent. In fact, the first respondent's witness (COW2), confirmed that as Capt. (Rtd) Ismail Adam was the applicant's immediate superior, he would be a better person to verify and confirm the applicant's job functions and responsibilities in the first respondent. The first respondent's failure to call Capt. (Rtd) Ismail Adam as well as Zulkifli Hj Simat as witnesses on its behalf to rebut the applicant's evidence in respect of the following issues, despite being in a position to do so, resulted in the applicant's testimony in this regard remaining unrebutted:

(i) Project Report for the period 10.10.1997 to 18.10.1997 (pages 43 to 49 of Exhibit RBL-5 attached to Enclosure 3);

(ii) the contents of the minutes of meetings dated 6.10.1997; 10.10.1997; 3.12.1997 and 15.12.1997 [pages 33 to 36 and pages 50 to 57 of Exhibit RBL-5 attached to Enclosure 3];

(iii) the true author of the "Safety And Health Policy And Local Procedures" dated 24.12.1997 [pages 59 to 112 of Exhibit RBL-5 attached to Enclosure 3];

(iv) the Applicant's testimony as regards the assurance given to him by Capt. (Rtd) Ismail Adam pertaining to the transfer of his services to the First Respondent in that the First Respondent would issue him a new letter of appointment, based on his existing terms and conditions with the Second Respondent;

(v) The Applicant testimony that he had on numerous occasions requested and reminded Capt. (Rtd) Ismail Adam as regards the issuance of his letter of appointment and in spite of that the First Respondent failed and/ or omitted to issue a letter of appointment to the Applicant;

I therefore view that the first respondent had not only made bare denials against the contents of the relevant and unequivocal documentary evidence produced by the applicant in support of his case but, had not produced an iota of evidence to support its challenges in respect of the same, despite the fact that the first respondent's witness (COW2) had confirmed that there were documents in this respect in the possession of the first respondent. These are facts within the knowledge of the first respondent and thus, it is for the first respondent to adduce evidence in this regard but, the first respondent failed to do this. The Industrial Court had misdirected itself in law and in fact in holding that the burden was on the applicant to produce Capt (Rtd) Ismail Adam as a witness to prove that he was an employee of the first respondent despite the fact that there were uncontroverted evidence led by the applicant before it that clearly show on a balance of probabilities that the applicant was an employee of the first respondent. The learned Chairman of the Industrial Court erred in law when she failed to hold that an adverse inference should be drawn against the first respondent for its failure to call as witness Capt (Rtd) Ismail Adam as regards the applicant's testimony and documentary evidence that he was an employee of the first respondent but, had instead drawn an adverse inference against the applicant. In the instant case if anybody should call Capt (Rtd) Ismail Adam to give evidence, it should be the first respondent as the proposed witness is not only a former employee of the first respondent but, he was employed with a subsidiary company of the first respondent. As such, Capt. (Rtd) Ismail Adam would be more obliged to come as witness if requested by the first respondent then by the applicant. In the circumstances, adverse inference ought to have been drawn against the first respondent for its failure to produce Capt (Rtd) Ismail Adam as witness.

In the case of *Cygal Bhd. v Issam Abdul Rahman* [1998] 3 ILR 44, at p. 48, the Industrial Court held:

Although the Company tried to prove that the termination letter relied only on the absence of the Claimant as the reason for terminating the Claimant's service the court believed that it did so after receiving the Claimant's solicitors' letter. Although the Company's letter was dated 16 July and did not refer to the solicitors' letter the Company only posted the letter on 21 July as evidenced by the post mark on the envelope (Exh. C118). The Company's executive director who dismissed the Claimant was not called as a witness to enlighten the court what was the real reason why the Claimant was dismissed. In the case of *Tetracon Engineering Sdn. Bhd. v. Abdul Latif Chek Mat* [1997] 1 ILR 31 sited by learned counsel for the Claimant the learned Chairman said:

> The Court agrees with the Claimant's submission that the director who made the decision to dismiss the Claimant, one Rahguram should have been called. His evidence as to the actual reason for the Claimant's dismissal is crucial since he is the dismissing authority. The Court is left with the evidence of COW1 who does not even have personal knowledge of the events.

The learned Chairman in arriving at her decision had in fact failed and neglected to consider the unequivocal documentary evidence which supported the applicant's case which were produced before her. There appears to be no reference at all to any of the documents produced before the Industrial Court in the impugned Award nor the reasons for the same. Therefore the Industrial Court misdirected itself when it failed to decide based on the unequivocal oral and documentary evidence adduced before it in that there was a contract of service which existed between the applicant and the first respondent. In the light of the foregoing, the impugned Award is erroneous in its entirety as its decision is perverse diametrically contrary to the evidence on record and is also such that no reasonable person or tribunal similarly circumstances would have arrived at.

2nd Error

The Industrial Court erred in law and in fact when it decided that the applicant failed to prove that he had been dismissed and held that the applicant had walked out of his job on his own accord.

In this respect, the learned Chairman of the Industrial Court held *inter alia* as follows pp. 230 to 232 of exh. RBL11 attached to encl. 11):

> Since the Company denied that they dismissed the Claimant but they had only asked the Claimant to return to the Second Company, therefore the burden to prove that a dismissal had taken place was on the Claimant since it was he who alleged that he had been dismissed.

The Claimant in his testimony besides stating that he had been informed about his dismissal by COW1 and he had not been able to see COW2 to find out the reason for his dismissal, he also testified that he did inform Capt. (Rtd) Ismail Adam about his dismissal and the latter told him that it was not within his knowledge. Besides this, the Claimant had not taken any other actions to ascertain his situation. He accepted that he was being dismissed without knowing the reason for his dismissal. The conduct of the Claimant was indeed puzzling. This is because when he was with COW1 he asked the latter the reason for his dismissal but after that he did not further pursue the matter. No explanation was given by the Claimant why he did not pursue the matter further with the Company or with COW2. Any reasonable person and more especially in the case of the Claimant who had been with the army and had been doing administrative works while he was there should at least ask for a letter of termination or the reason for the dismissal. His mere testimony that he was told he had been dismissed is insufficient in view of the contrary testimony from COW1 who stated that he informed the Claimant that his service was no longer required by the Company and he had to go back to the Second Company. The inaction on the Claimant's part and his impalpable conduct after the meeting with COW1 on 13 January 1998 were more consistent with him being told by COW1 to go back to the Second Company. Hence due to lack of evidence, the Claimant had failed to discharge the burden of proving that he had been dismissed by the Company.

…

After considering the totality of the evidence and the circumstances arisen, the Court is of the view that the Claimant had failed to prove that he was dismissed. The court finds that there was no dismissal but that he had walked out of his job on his own accord.

It is pertinent to note that the applicant's testimony on the issue relating to the events leading to his dismissal as considered by the Industrial Court in arriving at its aforesaid finding are as follows (pp. 67 and 68 of exh. RBL1 attached to enclosure 4):

Pada 12.1.1998, saya telah diberitahu oleh Kapten Ismail Adam melalui set "walkie-talkie" menyatakan Tuan Hj. Azman ingin berjumpa saya pada keesokkan harinya di pejabat RM Top Kelana Jaya. Ketika itu jam pukul 3.00 petang.

Pada 13.1.1998, saya pergi ke HQ RM Top untuk menemui Tuan Hj Azman. Tibanya saya di sana saya telah dipanggil oleh En. Toh Wah Ken ke pejabatnya. Beliau memberitahu saya bahawa Tuan Hj Azman mengarahkan beliau untuk memberitahu saya bahawa perkhidmatan saya ditamatkan mulai 15.1.1998.

Saya terkejut dan kecewa dan bertanyakan kepada beliau sebab-sebab saya ditamatkan perkhidmatan. Beliau menyatakan bahawa dia tidak tahu sebabnya dan menyuruh saya berjumpa sendiri dengan Tuan Hj Azman

Beliau juga ada memberitahu saya untuk mengambil gaji terakhir pada minggu ketiga bulan Januari, 1998.

Saya tidak ada berjumpa dengan Tuan Hj Azman walaupun saya ada menunggu lebih kurang setengah jam lepas keluar dari pejabat En Toh Wah Ken, dengan harapan dapat berjumpa dengan beliau.

…

Saya ada beritahu Kapten Ismail apa yang berlaku di Pejabat RM Top, Kelana Jaya. Dia juga beritahu bahawa pemberhentian saya adalah di luar pengetahuannya.

Semasa En. Toh Wah Ken beritahu saya bahawa perkhidmatan saya ditamatkan, beliau tidak suruh saya balik ke Koll.

Sepanjang saya bekerja di RM Top iaitu 3 bulan 2 minggu tidak sekali pun dipanggil oleh Kapten Ismail Adam mahupun Tuan Hj Azman tentang ketidakpuasan hati beliau terhadap perkhidmatan saya dan saya juga tidak menerima sebarang memo mengenai prestasi saya.

It is observed that the applicant's aforesaid testimony in respect of the events leading to his dismissal was not challenged by the first respondent in course of cross-examination. The failure to cross-examine the applicant on this explanation is fatal and must be taken as an acceptance of the truth of that part of the applicant's testimony by the first respondent. It is clear that the only reason that there was no explanation rendered by the applicant as to why he did not pursue the matter further with the first respondent or with the first respondent witness (COW2) was because the applicant was never cross-examined by the respondents on this point. The learned Chairman arrived at a perverse finding when it held that the applicant's mere testimony that he was told he had been dismissed is insufficient in view of the contrary testimony of COW1. The findings of the Industrial Court on this issue was on no evidence and is devoid of plausible justification that no reasonable body of persons or tribunal in similar circumstances would have reached. The Industrial Court arrived at a perverse and irrational decision in finding that the alleged inaction on the applicant's part and his alleged impalpable conduct on 13 January 1998 as being more consistent with him being told by the first respondent's witness (COW1) to go back to the second respondent when, there was not only no evidence to support this conclusion but also the first respondent's witness (COW1) had in fact admitted during re-examination that he cannot confirm that he had asked the applicant to go back to second respondent (p. 19 of exh.

RBL1 attached to encl. 4). In this regard, the finding of the Industrial Court is perverse and inconsistent with the evidence adduced before the Industrial Court as follows:

(a) the evidence the first respondent witness (COW1) that he, on the instructions of COW2, had informed the applicant that his services were no longer required by the first respondent, without assigning any reasons;

(b) the aforesaid evidence of the first respondent witness (COW1) was corroborated by the evidence of the first respondent's other witness (COW2);

(c) the first respondent's witness (COW1) had testified during re-examination that he cannot confirm that he had asked the applicant to go back to the second respondent (p. 19 of exh. RBL1 attached to encl. 4);

(d) the applicant's evidence that he was never informed by the first respondent's witness (COW1) to go back to the second respondent. This testimony was never challenged by the first respondent during cross-examination of the applicant and is thus, deemed to be accepted as the truth.

(e) the evidence of the first respondent's witness (COW2) confirmed that it was never discussed that after the period of the said project, the applicant would be transferred back to the second respondent. This was corroborated by the evidence of the second respondent's witness.

I am of the opinion that the Industrial Court took into account irrelevant considerations in arriving to the conclusion that the applicant failed to prove that he had been dismissed. From the evidence led before the Industrial Court it is clear that the applicant's services with the first respondent was terminated by the first respondent with effect from 15 January 1998. This fact was confirmed by the first respondent's witness (COW1) during cross-examination wherein he testified that on the instructions of COW2, he informed the applicant that his services were no longer required by the first respondent, without assigning any reasons. The testimony of the first respondent's witness (COW1) in this respect was corroborated by COW2. The Federal Court in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 case adopted the issue of termination *vis-à-vis* as was reflected at p. 136:

> We are of the opinion for the reasons given in *Dr. Dutt*'s Case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order of reinstatement or an award of compensation in lieu of reinstatement.

Earlier the court had stated as follows:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same.

In the instant case the Industrial Court not only failed to consider the unequivocal evidence that the applicant had discharged the burden placed on him to prove that he had been dismissed by the first respondent, but had further committed an error in law as the Industrial Court failed in its duty to make a finding of fact that the applicant was dismissed without just cause or excuse based on the facts and evidence before it. It is a well established principle of industrial law that in order to safeguard a workman's security of tenure, termination of his services must be grounded on just cause or excuse. In the case of *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, it was held that the burden of proof of the facts which would constitute just cause or excuse is on the employer. Such burden is discharged by the employer adducing evidence, either oral or documentary, to prove facts which he alleges constitutes just cause or excuse. In considering if the dismissal was with or without just cause or excuse, it is imperative that the Industrial Court consider the following issues:

(i) what are the reasons given by the first respondent for the applicant's dismissal?;

(ii) has the first respondent proved these reasons; and

(iii) if so, nevertheless does it constitute just cause and excuse for the dismissal.

Harun Hashim (as he then was) in the case of *Bata (M) Kelang v. Ch'ng Soon Poh* [1984] ILR 227 wherein at p. 229 expounded a three-stage test in considering a dismissal case:

> We are in no doubt that the duty of the Court is to make a finding whether the dismissal was without just cause or excuse as it is clearly so stated in section 20(1) of the Act. In arriving at its finding, the Court must first identify the employer's reason for dismissal. The next issue which the Court must consider is whether in the circumstances that dismissal was fair or unfair. This issue is determined by applying the following tests:

Did the employer act reasonably in forming his view of the facts?

Did the employer adopt a reasonable procedure?

Did the employer act reasonably in concluding that dismissal was warranted in the circumstances?

In the *Bata*'s case, the Industrial Court had to first identify the first respondent reason(s) for dismissal. In the instant case there is no letter of termination issued by either the first respondent nor the second respondent. However, from a perusal of the first respondent's statement in reply it appears that the applicant was dismissed for the following reason (p. 20 of exh. RBL3 attached to encl. 3):

5. The Company will contend that there was ample verbal notice given as he was on probation and was found to be unsuitable and not up to the expectation of the Company and did not have the expertise as was claimed.

It is pertinent to note that the person who took the decision to dismiss the applicant was the first respondent's witness (COW2). In cross-examination, the first respondent's witness (COW2) testified unequivocally that it was not true that he was involved in assessing the applicant performance. He further admitted that he never assessed the applicant's performance and only assessed the unsatisfactory work at the site as a whole. He never assessed the individuals at the site. He also confirmed that there were no documents before the Industrial Court in respect of the applicant's performance in the first respondent. The allegation of unsatisfactory performance at the first respondent's site as a reason of the applicant's termination was not pleaded in the statement in reply. It is trite law that a party is bound by its pleadings. The first respondent cannot seek to justify its action of terminating the applicant's service on this ground. Further, there was evidence which proved that despite this allegation of unsatisfactory performance at the first respondent's site, the first respondent never terminated the officer in charge of the said project, Capt. (Rtd) Ismail Adam, who was responsible for the overall operation of the said project at the site but, instead terminated the applicant, without giving him any reasons. The first respondent's witness (COW2) had in fact admitted that he had exercised the decision to terminate the applicant selectively (p. 38 of exh. RBL1 attached to encl. 4). What is even more interesting is that during the course of cross-examination by the applicant, the first respondent's witness (COW1) confirmed that the applicant was terminated about two (2) months after two (2) other site personals namely, Capt. Rahip and Ahmad Yusuf were terminated, on the same ground. This evidence clearly showed that the Applicant was terminated after he had completed and submitted the Safety And Health Policy And Local Procedures dated 24 December 1997 (pp. 59 to 112 of exh. RBL5 attached to

encl. 3) to the first respondent on 22 December 1998. It is crystal clear therefore that the first respondent had no grounds whatsoever for terminating the services of the applicant. The applicant's dismissal amounted to termination simpliciter in law. In the case of Dr. A. Dutt, Chang Min Tat FCJ speaking for the Federal Court in a move to advance social justice cited Indian authorities with approval and reasoned as follows at p. 312 of the Report:

> If this raises the hackles of employers and calls for denunciation about shackles on the freedom of contract, the following extract from the judgment of Gajendragadkar J. in *R.B. Diwan Badri Dass & Ors. v. Industrial Tribunal, Punjab, Patiala & Ors.* at pp. 633-4 will provide the answer:
>
> > The broad and general question raised ... on the basis of the employer's freedom of contract has been frequently raised in industrial adjudications; and it has been consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice. ...
> >
> > The doctrine of absolute freedom of contract has thus to yield to the higher claims for social justice ... Industrial adjudication does not recognise the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. Similarly the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to (industrial) employees ...
>
> The judgment of Gajendragadkar J. also cited with approval a passage from the judgment of Mukherjea J. in Bharat Bank Ltd., Delhi at page 209 which perhaps deserves to be quoted
>
> > In settling disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.
>
> ... the provision of "dismissal without just cause or excuse" in section 20(1) [of the Industrial Relations Act 1967] as a ground for a reference under section 20(3) implies in the case of a non-union workman that the right to "fire" implied in a "hire", in the social legislation of the Act, is limited to termination with just cause or excuse. Any other interpretation would fail to recognise that in entering into a contract of employment, the employer holds the sword by the hilt and requires the employee to grasp it by the blade and

would make nonsense of the whole purpose and intent of section 20. Were it otherwise, all that the employer has to do would be to be prudent and provide in express terms for termination of the employment at will, and he would stultify the Act and offend well-known principles of interpretation of statutes.

Similarly in the case of *Malaysia Milk Sdn. Bhd. v. Ng Chee Meng* [1987] ILR 175 termination was effected in accordance with a clause providing for notice period of termination. The learned Chairman held as follows at p. 177:

Clause 2 of the letter of appointment referred to in Exhibit NCM-1 above reads:

(2) During the first 6 months of your service, your employment may be terminated by either party upon giving one week's notice to the other. Thereafter either party may terminate your employment by one month's notice or payment of one month's salary in lieu of notice. (Court Exhibit MM-2 dated 7.11.1981).

On the face of the records, it would appear that the Claimant's employment contract was abrogated by termination simpliciter: that is to say, his services were terminated in accordance with his contract of employment. But termination simpliciter is no longer acceptable as valid if challenged in industrial law. It has long been established in this Court, and in superior Courts, that the termination of employment of a workman contractually, if ungrounded on just cause or excuse, is still dismissal without just cause or excuse as envisaged in Section 20 of the Industrial Relations Act, 1967 (Revised) – a provision of the law which gives protection of security of job tenure to workmen.

As Raja Azlan Shah CJ (as he then was) in his interpretation of the said Section 20 put it:

'We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal ... The effect is the same and the result must be the same.' – *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 at 136 (FC)

In other words, the right of an employer to terminate the employment of a workman is now subject to industrial adjudication in this Court. The employer can no longer rest his case merely on the contract of service alone and he cannot be allowed to say that having taken action under his contractual rights there is nothing more to be said by him to justify his action. (See *U.B.Dutt & Co. Private Ltd. v. Its Workmen* AIR [1963] (SC) 411). It is clear that the Company's reliance on Clause 2 of the Claimant's letter of appointment that the Company was entitled by it *per se* to terminate the services of the Claimant must be rejected.

I therefore conclude that the applicant's dismissal in the instant case is without just cause or excuse. In addition to that the manner in which the applicant was terminated was clearly unreasonable in all circumstances of the case and ought not be condoned. In this respect, the applicant testified as follows:

> CL-4 dirujuk – ini ialah prosidur keselamatan dan kesihatan yang saya sediakan. Saya telah diarahkan untuk sedia prosidur ini oleh Hj. Azman melalui Kpt. Ismail Adam. Tujuan saya diarah menyediakan prosidur – bagi pihak KLCC sekiranya satu-satu sub-kontraktor untuk menjalankan kerja-kerja di KLCC maka sub-kontraktor itu iaitu R.M. Top Holdings dimestikan mempunyai prosidur keselamatan dan kesihatan sebelum dibenarkan menjalankan kerja-kerja di KLCC. Saya menyediakan dokumen ini berpandukan kepada Akta Keselamatan dan Kesihatan Pekerja 1994. Saya juga berpandukan kepada "gondola operating procedures" yang mana saya perolehi semasa menghadiri kursus pada 8 dan 9 September 1997 dan juga saya membuat rujukan kepada Prosidur Keselamatan dan Kesihatan Pekerja kepunyaan KLCC. Juga saya membuat beberapa siri perbincangan dengan pegawai-pegawai yang bertanggungjawab mengenai keselamatan di KLCC iaitu Hj. Abdul Rahim dan Encik Zainuddin.
>
> CL-4 dirujuk – memang saya tidak tulis nama saya disini kerana pihak KLCC inginkan supaya prosidur ini ditandatangani oleh "Chief Operation Manager".
>
> Muka surat 1 di CL-4 dirujuk – KLCC menghendaki orang yang mengetuai projek ini untuk menandatangani prosidur. Saya memajukan prosidur ini kepada Kapt. Ismail pada 22.12.1997.

This testimony by the applicant was not challenged by the first respondent during cross-examination and is thus deemed to have been accepted by the first respondent. Thus the first respondent terminated the applicant's services after making use of him in preparing and submitting the Safety And Health Policy And Local Procedures dated 24 December 1997 (pp. 59 to 112 of exh. RBL5 attached to encl. 3). Once all the preliminary work in respect of the actual cleaning work was completed, the first respondent not only terminated the applicant's services suddenly and without assigning any reasons whatsoever but, went on further and alleged that it never employed the applicant in the first place. I think the Industrial Court being a court of equity and good conscience ought to have interfered with the order of dismissal that was made against the applicant as the manner in which it was done was clearly capricious, unjust and unreasonable. In the circumstances, the decision of the Industrial Court in this respect is perverse and irrational as he failed to address its mind to the issue before it and make a finding based on the fact and evidence before it. The decision is not properly reasoned. Again the Industrial Court's finding that the applicant had walked out of his job on his own accord is not only perverse but was never pleaded by either the first respondent or the second respondent.

As such, the Industrial Court had departed from the pleadings and made a finding in respect of an issue not before it. By so doing, the Industrial Court acted beyond its jurisdiction. As I said earlier it is trite law that parties are bound by their pleadings. In the case of *Rama Chandran, R v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, Mohd Eusoff Chin, CJ held at p. 162 as follows:

> It is trite law that a party is bound by its pleading. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

By making a finding that the applicant had walked out of his job on his own accord when no such claim was made against the applicant by either of the respondents in their respective pleadings, the Industrial Court had acted beyond its jurisdiction.

3rd Error

The Industrial Court erred in law and in fact when it held that there was no good reason to lift the veil of incorporation so as to hold the first respondent liable for liabilities arising out of the employment relationship entered into between the applicant and the second respondent.

In this respect the learned Chairman of the Industrial Court stated *inter alia* (p. 231 of exh. RBL11 attached to encl. 3):

> Except for what had been stated in the Claimant's pleading that the second company was jointly and severally liable with the Company for the Claimant's dismissal, no evidence whatsoever had been adduced that the second company was involved in the alleged dismissal. This could possibly be because the claimant was of the opinion that the second company had ceased to be his employer. Apart from this there was no good reason for the Court to lift the veil of incorporation of the second company just because the second company was managed by COW2's brother. In this circumstances the court needs not have to deal as whether the second company was liable over the alleged dismissal.

I am of the opinion that the learned Chairman erred in law and in fact as her findings in this regard are perverse and diametrically opposed to the following evidence which were adduced before her:

(a) the evidence of the first respondent's witness (COW1) which confirmed that at the time the applicant was employed by the second respondent, the first respondent was a shareholder of the second respondent and both the first respondent and the second respondent are managed by members of the same family; and

(b) the evidence of the first respondent's witness (COW2) confirmed that the second respondent was owned by his brother namely a Rosli Md Top;

Although the first respondent and the second respondent were separate legal entities, at that material times, both the respondents were operating as one business enterprise. Based on the facts and circumstances of the instant case, the arrangement whereby the second respondent appointed the applicant and subsequently transferred him to work in the first respondent is clearly a mere management practice between the first respondent and the second respondent, which practice should not be of any concern to the applicant and to the Industrial Court in determining the applicant's rights. The applicant therefore ought not have been prejudiced by the said arrangement agreed to by the respondents, prejudice which occurred when the Industrial Court erroneously found that the applicant's true employer was the second respondent. I think that when two companies, one of which is a subsidiary of the other are operating as one business enterprise, the court should lift the veil of incorporation and hold the parent company to be liable for the liabilities arising out of the employment relationship entered between the subsidiary and an employee. This approach is well-supported by the authorities and thus, in *Hotel Jaya Puri v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1980] 1 MLJ 109, the Federal Court held thus at p. 112:

> It is true that while a principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift the "veil of incorporation" (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith Stone and Knight v. Birmingham Corporation; Re F.G. (Films) Limited*; and *Firestone Tyre & Rubber Co. v. Llewelyn.* Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, page 213, said that the courts:

> are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* [1937] 58 L1. L.R. 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity ... in name alone and probably for the purposes of taxation'. In another case, *Spittle v. Thames Grit & Aggregates Ltd.* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 percent of its shares. A licensing authority in expertise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at page 202) ... A good example of this is *Bird & Co. v. Thos. Cook & Son* [1973] 2 All ER 227, in which an indorsement of a cheque to 'Thos. Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of Thos. Cook & son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle falsa demonstration non nocet.'

In this respect the Industrial Court in *Jimsburg Services Sdn. Bhd v. Rostam Wahidin* [1999] 2 ILR 334, the learned Chairman stated thus at pp. 332 and 333:

> The evidence led before the court shows that although JS and JC are separate legal entities in law, they essentially functioned as one business enterprise. The Claimant's remuneration and expenses are disbursed by both entities although there was in place an arrangement for JS to be reimbursed for payments made by them to the claimant by JC. He performed work for both of them. It was conceded by the claimant that JC was to pay his salary.
>
> The court would have had little hesitation to hold that when two companies one of which is the subsidiary of the other are operating as one business enterprise, the court should lift the corporate veil and hold the parent company to be liable for the liabilities arising out of the employment relationship entered into between the subsidiary and an employee. This approach is well-supported by the authorities. Thus in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1980] 1 MLJ 109, the Federal Court held:
>
> > It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the

expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith Stone and Knight v. Birmingham Corporation; Re F.G. (Films) Limited;* and *Firestone Tyre & Rubber Co. v. Llewlyn.* Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, page 213, said that the courts:

> are coming to recognize the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In the *Roberta* [1937] 58 L1 LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity … in name alone and probably for the purposes of taxation'. In another case *Spittle v. Thames Grit & Aggregate Ltd.* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 percent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at page 202) … A good example of this is *Bird & Co. v. Thos. Cook & Sons* [1973] 2 All ER 227, in which an indorsement of a cheque to 'Thos. Cook & Sons Ltd.' Was treated as an indorsement to the allied but separate company of Thos. Cook & son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle falsa demonstration non nocet.'

On the approach above, and if JC had been a subsidiary company of JS it makes no difference whether JS or JC is the employer of the claimant. However, in this case JC is not a subsidiary or even an associate company of JS, the latter holding no shares in the former. The two companies were operating as one enterprise due to the fact that both companies had common individual shareholders and directors in the persons of COW1 and the late Alexander David. The court will accordingly have to make a finding based on the evidence as to which one of the two companies was the real employer of the claimant.

In the instant case since the first respondent held shares in the second respondent and both the companies are managed by members of the same family, it made no difference whether the first respondent or the second respondent is the employer of the applicant and the Industrial Court erred in law when it failed to appreciate this fact based on the facts and circumstances of the case.

Although, at all material times, it had been applicant's contention that both the first respondent and second respondent were liable in respect of his dismissal from service, the applicant had in fact maintained that it was the first respondent who was his true employer. This fact is not only corroborated by the applicant's testimony (p. 71, lines 5 to 6; p. 72, lines 16 to 19 and p. 73, line 3 of exh. RBL1 attached to encl. 4) but by the representations made by the applicant to the second respondent wherein the applicant only made a complaint against the first respondent as his employer, which resulted in the Honourable Minister of Human Resources referring the dispute between the first respondent and the applicant to the Industrial Court for adjudication. It is observed that the need for the joinder and subsequent joinder of the second respondent as a party to the proceedings before the Industrial Court resulted from the first respondent's pleading in the Industrial Court (pp. 19 to 21 of exh. RBL3 attached to encl. 3). The joinder of the second respondent was necessary so as to enable the Industrial Court to arrive at a true decision on the facts relating to the applicant's employment, work and dismissal. The Industrial Court erred in law when it failed to lift the veil of incorporation of the second respondent and hold both the first respondent and second respondent liable for the applicant's dismissal from service.

In conclusion, having regard to all the above, the Industrial Court, in handing down Award No. 229 of 2002 dated 23 March 2002 erred in law and acted without jurisdiction and in excess of jurisdiction in that:

(i) it had arrived to a decision which was diametrically contrary and opposed to the evidence on record and which was unsupported by evidence;

(ii) it has, on the evidence available before it, reached absurd results and reached results absurdly such that its decision lacks a rationally probative basis in fact.

(iii) it had failed to address its mind to the issues and had rejected evidence relevant to the issues thereby arriving at the wrong conclusion;

(iv) it failed to give proper weight to the evidence before it; and

(v) it failed to take relevant matters into consideration and took irrelevant matters into consideration;

I hereby grant for an order in terms of prayers (i), (iii) and (v) of this application.